In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 702

FLOYD & BEASLEY TRANSFER CO., INC., APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of a three-judge district court (256 F. Supp. 23, J.S. 1a–5a) dismissing appellant's suit to set aside an order of the Interstate Commerce Commission (J.S. 91a–92a; report at 99 M.C.C. 258, J.S. 80a–91a),[1] denying appellant's application for a certificate of public con-

[1] The Commission had *sua sponte* reopened the case on the existing record (J.A. 77a), see text, p. 3, *infra*. Its previous report and order are found at J.A. 64a–76a.

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venience and necessity authorizing operations as a common carrier by motor vehicle of general commodities over irregular routes between four points in Alabama and points in four southeastern states.

Floyd & Beasley (F. & B), the appellant, is a common carrier by motor vehicle operating out of Sycamore, Alabama. It holds authority to transport general commodities, with the usual exceptions, over a regular route between Birmingham and Anniston, Alabama, and over irregular routes from Atlanta (Georgia), Birmingham (Alabama), Chattanooga, (Tennessee), and points in South Carolina to Sycamore and Sylacauga, Alabama. It is also authorized to move textile products from Sylacauga, Talladega, Childersburg, and Sycamore (all in Alabama) to points in Tennessee, Georgia, Alabama, and South Carolina. In this case F & B sought further authority to transport general commodities outbound from Sylacauga, Talladega, Childersburg, and Sycamore and inbound to Talledega and Childersburg.

F & B maintains terminals at Sycamore, Birmingham, Atlanta, Chattanooga, and Greenville, South Carolina. It proposed to route all less-than-truckload traffic moving to or from the four points in Alabama through its Sycamore terminals and to provide an overnight service between all points to be served directly. Its application was supported by thirty-six shippers seeking overnight service for less-than-truckload shipments outbound from the four Alabama points (J.S. 68a–70a); it was opposed by twenty-six motor carriers, operating in whole or in part over the routes sought

by F & B, which contended that existing service for the points involved was adequate and no further service was needed (J.S. 70a–73a). After a hearing, the Commission's examiner recommended that the application be granted, subject to a restriction here irrelevant (J.S. 20a).

The Commission, although adopting the examiner's principal findings of fact with certain modifications (J.S. 67a), denied the application on the ground that F & B had failed to establish a public need for the proposed service (J.S. 75a). A short time later it vacated *sua sponte* its determination (J.S. 77a) because in its prior report it had "inadvertently failed to give proper consideration to certain pleadings filed" (J.S. 81a).

On July 14, 1965, the Commission issued its report and order on reconsideration; it again denied the application because F & B had not established that the proposed service "would be responsive to a public need" (J.S. 91a). It found that the existing service was adequate, that the two principal carriers serving the four Alabama points frequently provided overnight service, and that no real need for expedited service had been shown (J.S. 90a). F & B's petitions for reconsideration (J.S. 92a–93a) and further hearing (J.S. 78a–79a) were denied.

F & B sued in the district court to set aside and enjoin the Commission's order. On June 24, 1966, a unanimous three-judge court dismissed the complaint. It held that the Commission was free to reach conclusions upon the evidence contrary to those of the

examiner; that substantial evidence supported the Commission's decision; and that its determination had a rational basis (J.S. 1a–5a).

ARGUMENT

The question involved in this case—whether there is a need for the particular motor carrier service proposed—has twice been considered by the Interstate Commerce Commission and has been reviewed by a three-judge district court. We submit that the dismissal of appellant's complaint was correct, and that no issue warranting plenary consideration by this Court is presented.

Whether additional motor service will serve the public convenience and necessity is committed to the sound discretion of the Commission. *Interstate Commerce Commission* v. *Parker,* 326 U.S. 60, 65. Appellant does not dispute the standards applied by the Commission in exercising this discretion: that the applicant must show by convincing evidence a public need for the proposed operations, and that a necessary element in this showing is the inadequacy of existing service to meet present or future transportation requirements. *Curtis, Inc.* v. *United States,* 225 F. Supp. 894, 898 (D. Colo.), affirmed, 378 U.S. 128; *Quickie Transport Company* v. *United States,* 169 F. Supp. 826, 828 (D. Minn.), affirmed, 361 U.S. 36; *Hudson Transit Lines, Inc.* v. *United States,* 82 F. Supp. 153, 157 (S.D.N.Y.), affirmed, 338 U.S. 802. Rather, it contends that because the examiner would have granted its application, and the Commission accepted his principal findings of fact, it could not reach

a contrary conclusion without "specifying in detail the error of the examiner"(J.S. 9). This contention misconceives both the relation between the agency and its examiner, and the nature of the evidence in this case.

Although the thirty-six shippers supporting F & B's application expressed interest in overnight less-than-truckload service to and from the four points, not one of them presented documents (such as freight bills) or testimony showing undue delay or other inadequacy in service. Many of the area shippers had not taken advantage of existing motor carrier services or were not even aware of their extent (J.S. 90a). In contrast, evidence for the protesting carriers showed that the two principal carriers serving the four points frequently offered overnight service and that time in transit was more than adequate for the ordinary traffic requirements of the area. The overall volume of less-than-truckload shipments was relatively low and there were only a few instances of emergency shipments (J.S. 90a). Thus, the Commission properly viewed this evidence as showing not a need for further service, but rather only a desire on the part of shippers to have available as much fast service as possible. And even if conflicting inferences could be drawn, it remains the responsibility of the Commission to resolve the conflict and draw the ultimate conclusions. *Illinois Central R. Co.* v. *Norfolk and Western R. Co.*, Oct. Term 1966, Nos. 15, 17, and 20 (decided November 14, 1966), slip opinion, p. 12.

This function of the Commission is not diminished because its examiner reached different conclusions on substantially the same facts. The responsibility for decision has been vested by Congress in the Commission, not in the examiner (*Radio Commission* v. *Nelson Bros. Co.,* 289 U.S. 266, 285–286); the Commission on review of the examiner's decision has "all the powers which it would have in making the initial decision * * *." Administrative Procedure Act, 5 U.S.C. 1007(a). It need not find that his determination is "clearly erroneous" as a prerequisite to reaching a different conclusion; but rather, it must give the findings the consideration and the effect they deserve in the circumstances of the case. *Universal Camera Corp.* v. *Labor Bd.,* 340 U.S. 474, 492–497. Here there was no issue of credibility and no other evidence which might confer special significance upon the examiner's findings. The only question was the inference to be drawn from those findings in the light of the policies and purposes of the Motor Carrier Act. These, as well as the ultimate conclusions to be drawn, were for the Commission. *U.S.A.C. Transport, Inc.* v. *United States,* 235 F. Supp. 689, 692–693 (D. Del.), affirmed, 380 U.S. 450; *Eagle Motor Lines, Inc.* v. *United States,* 236 F. Supp. 502, 504 (N.D. Ala.).

Moreover, the reasons for the different conclusions drawn by the Commission and by the examiner are adequately disclosed in the Commission's report.[2]

[2] For example, the examiner relied upon statements of shippers for his conclusion that present service was inadequate (J.A. 11a–12a, 18a). The Commission discounted that evidence in view of the lack of documented support for the statements, and instead characterized them as expressing desire rather than

Since that report is supported by substantial evidence on the record as a whole [3] and clearly reveals the reasons for the ultimate decision, the dismissal of appellant's complaint was proper.

Appellant also contends that the Commission erred when it refused to reopen the record for further hearing because one of the numerous carriers serving the area subsequently reduced its service. But this new consideration on its face obviously falls well short of the highly significant change in conditions involved in the case upon which appellant principally relies, *Atchison, T. & S.F. Ry. Co.* v. *United States,* 284 U.S. 248. See also, *Interstate Commerce Commission* v. *Jersey City,* 322 U.S. 503, 515. Reopening for further hearing is a matter resting in the Commission's sound discretion. *Interstate Commerce Commission* v. *Jersey City, supra,* at 514; *United States* v. *Pierce Auto Lines,* 327 U.S. 515, 535. In light of the evidence in the record as to the service furnished by other carriers (see J.A. 86a–88a), it is apparent that that discretion was reasonably exercised here.

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need (J.A. 84a–86a, 89a–90a; see text, p. 5, *supra*). In addition, the examiner concluded that existing motor carriers had not attempted to meet the needs of the shippers (J.A. 17a); the Commission found that the record as a whole showed no material inadequacy of service (J.A. 91a), and no pattern of existing service deficiencies (J.A. 90a).

[3] Of significance in respect to the relationship between the test on review and appellant's reliance upon the examiner's decision is this Court's comment in the *Universal Camera* case: "The 'substantial evidence' standard is not modified in any way when the Board and its examiner disagree." 340 U.S. at 496.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the intervening appellees, Alabama Highway Express, Inc., and Baggett Transportation Company, move that the judgment of the District Court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of a three-judge district court (J.S. 1a-5a, 256 F. Supp. 23) dismissing appellant's suit to set aside an order of the Interstate Commerce Commission (J.S. 91a-92a). In its report and order (J.S. 80a-91a, 99 M.C.C. 258), the Commission's Division 1, acting as an Appellate Division, denied appellant's application for a certificate of public convenience and necessity authorizing operations as a common carrier by motor vehicle of general commodities, over irregular routes between four points in Alabama and points in four southeastern states. On reconsideration, the denial was affirmed (J.S. 91a).

Intervening appellees are common carriers by motor vehicle domiciled at Birmingham, Alabama, and were active protestants to appellant's application for a certificate of public convenience and necessity before the Commission and were intervening defendants and filed supporting brief on behalf of the position of the United States of America and the Interstate Commerce Commission, the principal defendants before the Three-judge court. The extent of the interest of these intervening appellees is of record (J.S. 48a-49a, 50a-51a and 71a and 74a).

Alabama Highway Express, Inc., and Baggett Transportation Company, intervening appellees, adopt completely, and in full, the statement of facts, the argument, and the statement of the law in support thereof submitted by the United States of America and the Interstate Commerce Commission in their Motion to Affirm filed herein.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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